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No. 08-290

Supreme Court, U.S.
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In The
Supreme Court of the United States

UNITED STATES OF AMERICA EX REL. FARMER,

Petitioner,

v.

CITY OF HOUSTON AND
HOUSTON AREA URBAN LEAGUE, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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LIST OF PARTIES AND INTERESTED PERSONS

The following listed persons and entities may have an interest in the outcome of this case:

1. Ms. Marsha Farmer, the Petitioner-Appellant and Relator in the underlying case;

2. The U.S. Department of Housing and Urban Development ("HUD"), the grantor of federal funds that are the subject of this case;

3. Defendant-Appellee City of Houston ("City"), a local government entity and recipient of federal Community Development Block Grant ("CDBG") funds from HUD for the City's Emergency Home Repair Program ("EHRP"), which filed a Waiver, dated September 23, 2008, with this Court indicating that it would not file a response to this Petition; and

4. Respondent-Appellee Houston Area Urban League, Inc. ("HAUL"), a 501(c)(3) non-profit organization selected by the City as a sub-recipient of the CDBG funds for the implementation of the EHRP.

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INTRODUCTION

Contrary to the requirements of the U.S. Supreme Court Rules, Petitioner presents no "compelling reasons" for this Court to grant her Petition for a Writ of Certiorari ("Petition"). *See* Supreme Court Rule ("Sup. Ct. R.") 10. The Fifth Circuit's majority panel Opinion (the "Opinion") is fact-specific to this case and provides no new or extended legal principles that might set precedent for other cases; therefore, it does not merit review by this Court.[1] The Petitioner also does not assert that the Opinion involves an important federal question that has not yet been settled by this Court. *See* Sup. Ct. R. 10(c). Even though the Petitioner contends that the Opinion conflicts with other federal appellate decisions, the purported conflicts are illusory.

Petitioner's arguments are based on misrepresentations of the case law and the facts as found by the courts below. In an attempt to identify an issue meriting this Court's attention, Petitioner distorts the opinions of the District Court and the Fifth Circuit in this case. There is, however, no conflict with the Fifth Circuit's majority Opinion and the well-established jurisprudence, which allows an appellate court to affirm the rulings of a lower court on any ground that finds support in the record. Moreover, the Opinion

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[1] The Fifth Circuit's majority Opinion was authored by Judge Jerry E. Smith and joined by Judge Thomas M. Reavley. Notably, Chief Judge Edith H. Jones affirmed in part and dissented in part.

was not *sua sponte*, but rather addressed points raised by the Appellants Houston Area Urban League ("HAUL") and the City of Houston ("City") throughout the record of this case. *See generally,* Record of Appeal ("R.") 944-1627; HAUL's Fifth Circuit Brief. Petitioner also boldly misinforms this Court that she did not have an opportunity to be heard. Petitioner has, in fact, had several opportunities to be heard on all the issues raised in the record – both in writing and during the oral arguments before the courts below. Petitioner simply chose not to address all of the issues raised by the appellants in the record. As such, this Court should not review the latent arguments in the Petition.

Petitioner's assertion, that the Opinion conflicts with this Court's decision in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505 (1986) and invades the province of the jury, is misguided and exaggerated. The Fifth Circuit's majority panel Opinion is actually consistent with and supported by this Court's reasoning in the *Anderson* case as well as the progeny of cases on Federal Rule of Civil Procedure 56(c).

Moreover, the questions presented in the Petition regarding the presentment requirements under Section 3729(a) of the federal False Claims Act, 31 U.S.C. §§ 3729 *et seq.* ("FCA" or "Act"), are duplicative. In fact, this Court recently ruled on the exact same questions in the *Allison Engine* case. *See*

Allison Engine Co., Inc. v. United States ex rel. Sanders, ___ U.S. ___, 128 S. Ct. 2123 (2008).[2] The Petition does not expand or significantly alter the jurisprudence on this issue. The failure to raise any new federal questions or issues makes the Petition unworthy of this Court's review; thus, it should be denied.

Finally, Petitioner's last argument, in which she claims that the agreement between the City and HAUL that work under their contract would be subject to federal audit was in itself proof that they intended that any false records or statement would be material to the Government's decision to approve any such claims within Section 3729(a)(2) (Petition at 23), is completely unsupported and based on mere conjecture. This position ignores the fact that federal audits for the use of the federal grant funds are required under the applicable federal statutes and regulations. There is no proof of the parties' intention inherent in these federal requirements. Because Petitioner's assertions are both factually and legally incorrect, the Petition should not be considered by this Court.

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[2] At the time of the Opinion, this Court had not yet rendered its decision in the *Allison Engine* case. So, the majority's Opinion did not address the presentment issue, and instead affirmed the lower court's decision on other grounds in the record. Because the Fifth Circuit's Opinion did not discuss presentment, Respondent HAUL is not currently challenging this Court's decision in the *Allison Engine* case. As such, this Court's reconsideration of these similar issues from *Allison Engine* would be an unnecessary waste of the Court's time and resources.

In sum, none of the criteria warranting the U.S. Supreme Court's review is present in the Petition. Therefore, Respondent HAUL respectfully requests that this Court deny the Petition for Writ of Certiorari.

COUNTER-STATEMENT OF THE CASE

I. Underlying Allegations

This case involves allegations brought under the FCA in connection with federal grant funds from the U.S. Department of Housing and Urban Development ("HUD"). Specifically, at issue is the implementation of the City's Emergency Home Repair Program ("EHRP" or "Program"). The City entered into an agreement with HUD to implement the EHRP using the grant funds. Although there are some general statutory and regulatory requirements for the grants, these funds applied broadly to a number of different community development activities. *See* 42 U.S.C. §§ 5301 *et seq.*; 24 C.F.R. §§ 570.601 *et seq*. At the time of the agreement between HUD and the City, there were no statutory or regulatory guidelines specific to the implementation of the Program. (R. 1157). In fact, HUD allowed the various grant recipients to create their own guidelines for the EHRP subject to periodic audits and reviews mandated by the federal statutes and regulations. (R. 2581); *see also* 24 C.F.R. § 85.20; 24 C.F.R. § 570.502; 42 U.S.C. § 5301.

Respondent HAUL was one of four non-profit grant subrecipients selected by the City to implement a portion of the EHRP. (R. 1157). Instead of using HAUL employees, HAUL retained third party contractors to conduct the repairs to residences accepted into the Program. (R. 1157). After the Program repairs were completed and approved, the City would provide reimbursement to HAUL based on monthly invoices submitted by the third party contractors from a previously-established line of credit or "draw down" account. (R. 2581).

For various reasons, Petitioner Marsha Farmer's residence was denied repair under the EHRP, which became the basis of her lawsuit. (R. 1158). Petitioner primarily alleged that the City and HAUL violated the FCA by submitting to HUD false claims for payment or approval. The decisions of the courts below in this case have correctly held that the Petitioner did not have sufficient evidence to prove every element of her FCA claims and, thus, could not overcome the City's and HAUL's motions for summary judgment.

II. Procedural Background

Petitioner initially filed this *qui tam* action in 2003 alleging that both the City and HAUL violated several provisions of the FCA. (R. 22-30). After conducting in-person and telephonic hearings on the issues raised in several motions filed by the parties, on August 16, 2006, the District Court rendered a Memorandum and Order granting the City's and HAUL's motions for summary judgment as to

Petitioner's potential causes of action under every section of the FCA, 31 U.S.C. § 3729(a)(1) through (a)(7). *See United States ex rel. Farmer v. City of Houston*, No. 03-03713, 2006 U.S. Dist. LEXIS 57741 (S.D. Tex. Aug. 16, 2006) (R. 2583-2597; Petitioner's Appendix ("Pet. App.") 47-71).

On appeal, Petitioner focused primarily on two provisions of the FCA – sections 3729(a)(2) and (a)(3).[3] The Fifth Circuit rendered its Opinion affirming the lower court's decision on March 25, 2008, which is captioned *United States ex rel. Farmer v. City of Houston*, 523 F.3d 333 (5th Cir. 2008). (Pet. App. 1-33). The Fifth Circuit later denied both the Petitioner's Petition for Rehearing *En Banc* (Pet. App. 76-77) and her Motion to Stay the Mandate.

Also, it is important to note that after HUD conducted its own investigation and despite prior notification of this case, the Department of Justice ("DOJ") declined to intervene in Petitioner's underlying FCA action in the District Court. (R. 52-53). Although the DOJ did eventually participate in the Fifth Circuit appeal regarding the interpretation of FCA § 3729(a)(2), it did not join the Petitioner in seeking a rehearing of the Opinion.

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[3] Notably, the Petitioner is not seeking certiorari of its challenge under Section 3729(a)(3) of the Act because the entire Fifth Circuit panel affirmed the finding of the lower court that the Petitioner did not have sufficient evidence to support her conspiracy claim.

REASONS FOR DENYING THE WRIT

I. The Fifth Circuit's Opinion Does Not Warrant Review By This Court Because It Is Supported By The Record.

Petitioner improperly attempts to inflate this case into one presenting a profoundly important federal question regarding the scope of appellate review of the lower court's decision; but, it is nothing of the sort. Petitioner mischaracterizes the Fifth Circuit's majority panel Opinion as *sua sponte*, even though the Opinion is based upon and completely supported by the record below. In fact, the entire Opinion is replete with citations to and examples from the record. *See, e.g.,* Opinion at 8-11. Moreover, the Fifth Circuit's analysis of the summary judgment evidence is consistent with myriad decisions rendered by this Court as well as other federal courts.

It is well-established by this Court that an appellate court has discretion to uphold a summary judgment under a legal theory different from that applied by the trial court, *Dandridge v. Williams*, 397 U.S. 471, 475 n.6, 90 S. Ct. 1153 (1970), and rest the affirmance "on any ground that finds support in the record." *See Jaffke v. Dunham*, 352 U.S. 280, 281, 77 S. Ct. 307, 308 (1957) ("A successful party in the District Court may sustain its judgment on any ground that finds support in the record."). Further, this Court in as early as 1937, found that this rule of law was "inveterate and certain." *Morley Constr. Co. v. Maryland Cas. Co.*, 300 U.S. 185, 191, 57 S. Ct. 325 (1937). This historical principle is also supported by

the consistent practice of several circuit courts. *See, e.g., United States v. Rivera-Nevarez*, 418 F.3d 1104, 1112 (10th Cir. 2005); *Missouri Pac. R.R. Co. v. Harbison-Fischer Mfg. Co.*, 26 F.3d 531, 538 (5th Cir. 1994); *Walton v. Morgan Stanley & Co., Inc.*, 623 F.2d 796, 797 & n.1 (2d Cir. 1980); *United States v. General Motors Corp.*, 518 F.2d 420, 441 (D.C. Cir. 1975); *Helena Rubinstein, Inc. v. Bau*, 433 F.2d 1021, 1023 (9th Cir. 1970).

Respondent recognizes, as a general exception, that an appellate court would likely hesitate to affirm the grant of summary judgment if the proper ground for granting it had not been raised and argued below. *See British Airways Board v. Port Authority*, 558 F.2d 75, 82 (2d Cir. 1977). This is, however, not the case here. From the onset, the City and HAUL have challenged the insufficiency of the Petitioner's allegations. The reasons found by the Fifth Circuit to be proper for affirming the District Court's grant of summary judgment were, in fact, raised on several occasions by Respondent and the City in the record and argued below. (R. 944-1154, 1155-1336, 2398-2411, 2437-2438). Specifically, for example, Respondent HAUL not only argued that no presentment was required under Section 3729 of the FCA, but that even if there was such a requirement, Petitioner failed to present sufficient evidence of a *prima facie* case. (R. 1155-1336). Further, it is likewise settled by this Court that appellees themselves may urge in support of a judgment any matter appearing in the record even on grounds rejected or ignored by the lower

court, *United States v. American Ry. Exp. Co.*, 265 U.S. 425, 435, 44 S. Ct. 560 (1924), which is also what HAUL and the City did in this case. The fact that HAUL made some arguments in the record while the City made other similar arguments in other parts of the record is immaterial because there is *only one record* in this case. As such, the Fifth Circuit's actions were not *sua sponte,* and its Opinion was properly rendered.

Contrary to the Petitioner's position, the Fifth Circuit does not have to affirm a decision on a Rule 56 motion for the same reasons that persuaded the court below to grant the motion. *See Jaffke v. Dunham*, 352 U.S. 280, 281, 77 S. Ct. 307, 308 (1957); *see also* C. Wright & A. Miller, 10A *Federal Practice and Procedure* § 2716 (3d ed. 1998). Even if the District Court in this case focused on the presentment issue in reliance on *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004), while the Fifth Circuit did not address the issue, the appellate court was free to find another ground in the record for concluding that the City and HAUL were entitled to summary judgment as a matter of law. *See Helvering v. Gowran*, 302 U.S. 238, 245, 58 S. Ct. 154 (1937) ("In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason."); *see also Church of Scientology of California v. Cazares*, 638 F.2d 1272, 1281 (5th Cir. 1981) (finding that even if the district court applied

the incorrect legal standard in granting summary judgment, the court of appeals could uphold the decision if it was apparent on appeal that no genuine issue of fact existed under the proper legal analysis). As such, Petitioner's arguments that the Fifth Circuit was not empowered to affirm on grounds not addressed by the district court is without merit. Thus, the Petition should be denied.

Notably, the cases referenced by Petitioner under Sections I and II of the Petition are inapposite to the instant case. *See* Petition at 8-11. Several of the cases cited involve situations where the appellate court rendered decisions on issues without providing the party with notice or opportunity to be heard on the issue – which is not relevant here. In *Burns v. U.S.*, for example, the district court departed from the sentencing guidelines without notifying the parties. *See Burns v. U.S.*, 501 U.S. 129, 111 S. Ct. 2182 (1991). This decision has absolutely nothing to do with Petitioner's case. Similarly, Petitioner misses the mark when she cites to the Second Circuit's decision in *Acosta v. Artuz*, 221 F.3d 117 (2d Cir. 2000), where a habeas corpus petition dismissed as untimely on its face was vacated and remanded because defendant was not given an opportunity to address the issue. Again, this line of cases does not remotely apply. None of these cases have anything to say about whether a court of appeals can affirm a district court on alternate grounds when the district court's ultimate decision is correct as it is here. Hence, Petitioner's arguments are unsupported and should not be considered by the Court.

II. Review By This Court Is Unnecessary Because The Rulings Below Were Correct.

A. The Opinion Is Consistent With This Court's Decision in *Anderson*

There is no conflict between the Fifth Circuit's majority panel Opinion and this Court's decision in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S. Ct. 2505, 2509-10 (1986). In a feeble attempt to show a contradiction in the Opinion, the Petitioner distorts the appellate court's standard of review despite the plethora of law in this area. When determining whether the moving party is entitled to judgment as a matter of law, only facts that may affect the outcome of a case under governing substantive law are "material." *Anderson*, 477 U.S. at 247, 106 S. Ct. at 2510. "Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson*, 477 U.S. at 248, 106 S. Ct. at 2510. The mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. *See id.* at 247-48, 106 S. Ct. at 2510. An inference as to a material fact may be drawn in favor of the nonmoving party ***only if*** it is "rational" or "reasonable" and otherwise permissible under the governing substantive law. *Anderson*, 477 U.S. at 253-54, 106 S. Ct. at 2513; *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986). Here, the Petitioner could not simply rely on unsubstantiated or conclusory

assertions that a fact issue exists to overcome summary judgment. Because the Petitioner failed to provide evidentiary support for every element of her *prima facie* FCA claims, the District Court's grant of summary judgment in favor of the City and HAUL, and the Fifth Circuit's affirmation of the same, were appropriate and consistent with the established jurisprudence.

Moreover, the Petitioner's contention that this Court may not consider what a reasonable juror would think about the facts in this case is dead wrong! In fact, this Court in *Anderson* expressly contradicts the Petitioner by stating, *"The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict."* 477 U.S. at 252, 106 S. Ct. at 2512 (emphasis added); *see also* Fed. R. Civ. P. 56(c). In effect, this Court's language in the *Anderson* case completely discredits the Petitioner's argument in the Petition and supports the Opinion. As such, this Court should not consider the merits of this argument and should deny the Petition.

B. This Court's Review of the Petition Would be Futile Because Petitioner Cannot Prove Every Element of Her *Prima Facie* Case

Importantly, there is nothing in the Petition that changes the fact that Petitioner failed to introduce

sufficient evidence to prove every element of her *prima facie* case under the FCA. Specifically, Petitioner did not, and cannot, show that HAUL or the City knowingly submitted a false claim to the Government for payment or approval. Petitioner is required to show more than the defendants demonstrated innocent mistakes, mere negligence, or even gross negligence – all of which are not actionable under the Act. *See United States ex rel. Ervin & Assocs. v. Hamilton Secs. Group,* 298 F. Supp. 2d 91, 101-02 (D.D.C. 2004). Moreover, Petitioner had the burden to prove that the alleged falsity of any claim was *material* to the Government's decision to pay that claim. *See United States ex rel. Luckey v. Baxter Healthcare Corp.,* 183 F.3d 730, 732-33 (7th Cir. 1999); *United States ex rel. Stebner v. Stewart & Stevenson Services, Inc.,* 305 F. Supp. 2d 694, 698 (S.D. Tex. 2004) ("In fact, FCA liability does not exist if the alleged fraudulent act had no bearing on the Government's payment decision."). Petitioner's failure to introduce any evidence of these requisite elements of her *prima facie* FCA case further supports the Opinion in this case. As a result of the insufficiencies in the underlying case, this Court's review of the Petition would be in vain; thus, it should be denied.

III. Granting The Writ Would Serve No Practical Purpose Because There Is No Proper Basis for Review of the Petitioner's FCA Section 3729(a) Questions.

Moreover, the Petitioner's reliance on this Court's decision in *Allison Engine* is misplaced. *See Allison Engine Co., Inc. v. United States ex rel. Sanders*, ___ U.S. ___, 128 S. Ct. 2123 (2008). In fact, the *Allison Engine* decision is immaterial to the present case because the ultimate decision in *Allison Engine* would not significantly affect the outcome here. *Id.* Although this Court in *Allison Engine* determined that the FCA does not require presentment for a Section 3729(a)(2) claim, the lower courts' decisions are proper in this case because the Petitioner has not met her burden to prove the other elements of her *prima facie* case under the FCA. *See* discussion *supra*. The Petition should, therefore, be denied because it neither presents any substantial question regarding her FCA claims that has not already been settled by this Court, nor does it raise any new federal questions or issues worthy of this Court's consideration.

Finally, Petitioner's contention that the so-called agreement between the City and HAUL that work under their contract would be subject to federal audit was in itself proof that they intended that any false records or statement would be material to the Government's decision to approve any such claims within Section 3729(a)(2) of the FCA is meritless and confusing. Not surprisingly, the Petitioner devotes only three sentences to this position and fails to include

any case law or other legal authorities to support this claim. Yet, more importantly, this argument is illogical and inconsistent with the facts and applicable legal authorities. For instance, the requirement for an audit was not based on any agreement between the City and HAUL, but rather on the mandatory provisions in federal statutes and regulations. *See* 24 C.F.R. § 85.20, 24 C.F.R. § 570.502; 42 U.S.C. § 5301. The Petitioner's flawed analysis on this point is further emphasized by her improper request to this Court that "If intent that false records or statements be material is not established as a matter of law then the jury should pass on these issues." (Petition at 23). Note, however, that several circuit courts, including the Fifth Circuit, have reaffirmed that a scienter requirement as well as materiality are essential elements of any FCA claim. *See, e.g., United States v. Southland Mgmt. Corp.*, 326 F.3d 669, 679 (5th Cir. 2003). In fact, this Court in *Allison Engine* even stressed a requisite *mens rea* under the FCA and found that a subcontractor "violates § 3729(a)(2) if it submits a false statement to the prime contractor *intending* that contractor to use the statement to get the Government to pay its claim." *See Allison Engine Co., Inc.*, 128 S. Ct. at 2125 (emphasis added). Because materiality and scienter are required to impose FCA liability, the Petitioner is wrong to suggest or imply that the Court allow the jury to "pass on these issues." As a result, the Court's denial of the Petition is appropriate.

CONCLUSION

For all of the foregoing reasons discussed herein, the Petition for Writ of certiorari should be denied.

Respectfully submitted,

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